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NO. 93-963

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

J. L. REICHLIN, individually, and
UNKNOWN POLICE OFFICERS OF
THE CHESTERFIELD COUNTY
POLICE DEPARTMENT,

Petitioners,

v.

VIRGINIA ENWEREMADU, STANIEL
ENWEREMADU, an infant, and STANTON
ENWEREMADU, an infant,

Respondents.

REPLY TO THE PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief opposing

~~REPLY~~ TO THE PETITION FOR WRIT OF CERTIORARI

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pp

QUESTION PRESENTED FOR REVIEW

1. Whether the decision by the United State court of appeals for the Fourth Circuit reversing the dismissal of respondents' complaint was in conflict with decisions of other United States Court of Appeals on the same matter such that a writ of certiorari should be granted.

LIST OF PARTIES

The Petitioners are J. L. Reichlin, a police officer for the County of Chesterfield, Virginia and Unknown Police Officers of Chesterfield County, Virginia.

The Respondents are Virginia Enweremadu and two of her minor children, Staniel Enweremadu and Stanton Enweremadu.

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NO._____

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**REPLY TO THE PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The respondents, Virginia Enweremadu, Staniel Enweremadu, and Stanton Enweremadu respectfully request that the Court deny a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and affirm the judgment entered by the Court of Appeals on August 18, 1993.

OPINIONS BELOW

The United States District Court for the Eastern District of Virginia (Williams, D.J.) on May 13, 1992 granted the petitioners' Motion to Dismiss. The District Court issued an opinion on June 18, 1992 denying Enweremadu's Motion for Relief from Judgment and to Amend the Complaint. (App. 24) The United States Court of Appeals for the Fourth Circuit reversed the District Court by an unpublished per curiam opinion, which is accessible on Lexis at 1993 U.S. App. 20920; Westlaw at 1993 WL 311914 (4th Cir. (Va.) and

also appears at 2 F.3rd 1149.

JURISDICTION

The Enweremadus brought this suit in the United States District Court for the Eastern District of Virginia invoking federal jurisdiction under 42 U.S.C. § § 1983 and 1988, as well as 28 U.S.C. § 1343. The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 18, 1993. The petitioner filed a Rehearing and Suggestion for Rehearing In Banc, which was denied on September 15, 1993. The petitioners subsequently filed a Petition for a Writ of Certiorari on December 14, 1993. The respondents timely file this Brief in Opposition. Jurisdiction is invoked in this Court under 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court.

RELEVANT STATUTES AND REGULATIONS

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On or about October 17, 1991, Virginia Enweremadu ("Enweremadu" or "Respondent") along with her daughter, Staniel, and son, Stanton, filed an action against J. L. Reichlin, ("Reichlin") Individually, and unknown police officers of the Chesterfield County Police Department, each of whom were acting under color and pretense of state law. (App. 1-2). Appellants alleged that on March 6, 1990, Reichlin, acting in his capacity as a Chesterfield County police officer, went to respondents' home in Chesterfield, Virginia to serve two misdemeanor warrants on

Enweremadu. (App. 3). When Reichlin arrived, Enweremadu was at work. (App. 3). Enweremadu's daughter, Staniel, answered the door and told Reichlin she could not open the door for anyone per her mother's instructions. Reichlin threatened to break down the door, drag Staniel outside and choke her if she refused to open the door. (App. 3). Staniel became hysterical and called her mother at work. (App. 3). When Enweremadu arrived home, both her children were upset and crying and Reichlin had left the premises. (App. 4). Enweremadu called 911 to request assistance. (App. 4).

Reichlin returned to respondents' home, entered without knocking through an open door and informed Enweremadu that he had a warrant for her arrest. (App. 4). Enweremadu attempted to call 911 again for assistance, and as she did so, Reichlin grabbed her from behind in a choke hold. (App. 5). Stanton attempted to rescue his mother from Reichlin, at which point, Reichlin struck him in the face, throwing him backwards. (App. 5). When Enweremadu again attempted to call 911, Reichlin pulled the phone from the wall. (App. 5). Staniel called 911 to report the incident, during which time Reichlin again grabbed Enweremadu in a choke hold. (App. 5). When the 911 dispatcher called the home, Reichlin stopped his assault on Enweremadu. (App. 6).

When the other officers arrived, the unknown officers grabbed Enweremadu around her neck and rendered her semi-conscious. (App. 6). Enweremadu's feet and hands were bound. (App. 6). Staniel was also grabbed around the neck by the unknown police officers. (App. 6).

Enweremadu was charged with resisting arrest, which charge was subsequently dismissed by the Commonwealth. (App. 8).

Respondents alleged excessive use of force by Reichlin; a violation of respondents' first amendment rights; and state claims of gross negligence, assault and battery and malicious prosecution. (App. 8-10).

On or about April 6, 1992, petitioners filed a motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure because the complaint alleged only a violation of the First and Fourth Amendment of the U.S. Constitution, which failed to state a claim under 42 U.S.C. section 1983.

On May 13, 1992, the U.S. District Court granted petitioners' motion to dismiss with prejudice, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Court declined to exercise supplemental jurisdiction over respondents state law claims, which were dismissed without prejudice.

On May 22, 1992, respondents filed motions to alter and amend the Court's order of May 13, 1992 and for relief from the judgment pursuant to Rule 59(e) and 60(b)(1) and (6) of the Federal Rules of Civil Procedure. On June 8, 1992, respondents filed a motion for leave to file an amended complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

On June 18, 1992, the Court entered its Order denying respondents' motions to alter and amend judgment, for relief from judgment and for leave to amend. (App. 30)

On August 18, 1993 the Fourth Circuit entered a judgment reversing the decision of the district court. The Fourth Circuit properly decided the jurisdictional issue in Enweremadu based on this court's decision in Graham v. Connor, 490 U.S. 386 (1989), as well as a litany of Fourth Circuit cases which state that 12(b)(6) motions should not be granted unless it appears beyond doubt that the plaintiff can not prove a set of facts to support her allegations. See Revene v. Charles City County Commissioners, 882 F.2d 870, 872 (4th Cir. 1989); District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083, 1085 (4th Cir. 1979); Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969). The Fourth Circuit concluded that jurisdiction could be clearly shown in a well pled complaint and as such the complaint should not have been dismissed. (App. 31)

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Decision of the United States Court of Appeals is not in conflict with any other United States Court of Appeals on the same matter nor has it departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of discretion and therefore should not be granted.

Review on a writ of certiorari is governed by Rule 10.1(a) of the Rules of the Supreme Court, which states that such a writ "will only be granted when there are special and important reasons." The Rules set forth in paragraph (a)-(c) the character of reasons that will be considered. Paragraph (a) is the only applicable paragraph

to this case, and it provides:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed form the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The petitioners allege that the reversal by the court of appeals of the Fourth Circuit conflicts with this Court's decisions and the decision of other federal court of appeals. In support of that argument, petitioners allege that the court of appeals has eliminated the Fourteenth Amendment as a jurisdictional element for section 1983 suits.

Petitioners have misstated entirely the Court's reasoning. The opinion is very specific as to the requirement that the Fourteenth Amendment is part of the basis for the section 1983 claim. Bearing in mind that the court of appeals was reviewing a dismissal with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court followed the holdings in Conley v. Gibson, 355 U.S. 41. 45-46 (1957) and Revene v. Charles County Commrs., 882 F.2d 870, 872 (4th Cir. 1989), which held that dismissal under Rule 12(b)(6) is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts to support his [or her] claim which would entitle him [or her] to relief." Clearly, the Court was following precedent in both this court and for the Fourth Circuit on this issue. (App. 39).

The Court noted that the Enweremadus' complaint adequately stated a Fourth Amendment claim even without express reference to

the Fourteenth Amendment in the pleading by alleging excessive use of force. (App. 39, 40).

The Court also noted:

> Although it is true, as a technical matter, that the Fourth Amendment only applies to the states by means of the Fourteenth Amendment, it was and is clear from the nature of the action that the appellants have contended that their federal constitutional rights were violated by state officials...the failure to mention the Fourteenth Amendment in a complaint does not undermine the validity of the substantive claim, nor justify dismissal where the plaintiffs can prove a set of facts in support of their claim.

(App. 40-41). Contrary to petitioners' assertion, the Court did in fact consider the applicability of the Fourteenth Amendment. The Court has not deviated from the law of either this court or courts in the Fourth Circuit or any other circuit.

Petitioners' petition is blatantly lacking in any discussion of the context in which this case was considered; that being whether the complaint was properly dismissed pursuant to Rule 12(b)(6). Petitioners offer no counter to the court's reasoning that the complaint was factually sufficient and therefore should not have been dismissed under Rule 12(b)(6).

The Court of Appeals followed a long standing vein of Fourth Circuit cases that establish that "[I]f facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded. " Blue v. Craig, 505 F.2d 830, 844 (4th Cir. 1974); Provident Life & Accident Insurance Company v. Waller, 906 F.2d 985, 988 (4th Cir. 1990). The court went on to note that this referencing failure to the jurisdictional connection provided by the Fourteenth

Amendment does not alter the integrity of the factual allegations or make the complaint right for dismissal. (App. 36). The Fourth Circuit further stated that they believed the facts in the Enweremadus' complaint demonstrate that a federal question was involved. (App. 37).

By the very nature of section 1983, there are only two elements the plaintiff must allege: (1) that the defendant deprived her of a federal right and (2) that the defendant did so while under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). The Court noted that the Enweremadus' complaint adequately alleged both elements. (App. 36).

Accordingly, the Court did not render a decision in conflict with the decision of another United States court of appeals on the same matter and the petitioner is not entitled the exercise of this Court's discretion in the granting of a writ of certiorari.

Additionally, the petitioners incorrectly claim that if the case is dismissed, the Enweremadus will be free to file their claims in state court under Virginia law's tolling of the statute of limitation. (Petitioners, Brief, p.22, fn5). A recent Virginia case, however, held contrary to this assertion. In Vacom, Inc. v. The Board of Supervisors of Fairfax County, et al, the court stated in its ruling that in its interpretation of section 8.01-229 (E)(1) of the Virginia Code, the statute of limitation was not tolled during the pendency of a case in federal court. (App. 48).

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied. The petition fails to establish the Court of Appeals for the Fourth Circuit rendered a decision in conflict with the decision of another United States court of appeals on the same matter or any other basis establishing that there are important and special reasons to support the exercise of this Court's discretion.

Respectfully submitted,
VIRGINIA ENEWEREMADU,
STANIEL ENWEREMADU, an infant,
and STANTON ENWEREMADU, an infant

BY _____
OF COUNSEL

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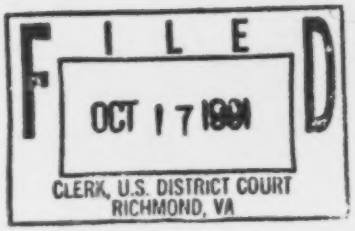
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



VIRGINIA ENWEREMADU;
and
STANIEL ENWEREMADU, an infant, by and through Virginia Enweremadu, her mother and next friend;
and
STANTON ENWEREMADU, an infant, by and through Virginia Enweremadu, his mother and next friend

Plaintiffs,

v. CIVIL ACTION NO. 3:91CV598

J. L. REICHLIN, Individually, and

UNKNOWN POLICE OFFICERS OF THE CHESTERFIELD COUNTY POLICE DEPARTMENT

Defendants.

Serve at: 7743 #D Bannock Barn Drive
Richmond, Virginia 23225

COMPLAINT

COME NOW, your plaintiffs, by and through their counsel, and for their causes of action, state as follows:

A. PARTIES

1. Plaintiff, Virginia Enweremadu, hereinafter referred to as "Virginia" is a resident of Chesterfield County, State of Virginia. She brings this action in her individual capacity.

2. Plaintiff, Staniel Enweremadu, hereinafter referred to as "Staniel", date of birth is July 17, 1977. She is the infant daughter of Virginia Enweremadu.

3. Plaintiff, Stanton Enweremadu, hereinafter referred to as "Stanton", date of birth is May 29, 1979. He is the infant son of Virginia Enweremadu.

4. Defendant, J. L. Reichlin, hereinafter referred to as "Reichlin", at all times herein mentioned, was a resident of Chesterfield County, Virginia. He was employed as a police officer for the Chesterfield County Police Department.

5. Defendants, unknown police officers, hereinafter referred to as "unknown police officer(s)", were at all times relevant herein, employed by Chesterfield County Police Department as police officers. They responded to the residence of the plaintiffs on March 6, 1990; and, violated the rights of the plaintiffs as is more fully stated within the instant complaint.

6. Each and all of the acts of the defendants set forth herein were done by them under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the State of Virginia and its political subdivisions. The said acts were accomplished by virtue of and under the authority of their office as a police officers of the Chesterfield County Police Department.

B. JURISDICTION

7. This action arises under the United States Constitution, particularly under the provisions of the First and Fourth Amendments to the United States Constitution; and, under the laws of the United States, particularly 42 U.S.C. 1983 and 1988.

8. This Court has jurisdiction over these causes of action under 28 U.S.C. 1343.

9. Plaintiffs further invoke the doctrine of pendent jurisdiction and request this Court to allow them to append in this federal complaint certain stated causes of action to wit, malicious

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prosecution, assault and battery and gross negligence, all of which arise out of a common nucleus of fact and circumstances. Moreover, judicial economy necessitates that the stated causes of action be heard simultaneously and in conjunction with the federal claims set forth herein.

FACTS

10. At approximately 8:45 p.m. on or about March 6, 1990, Reichlin, acting in his capacity as a Chesterfield County police officer, went to Virginia's residence, 4366 Jalee Drive, Richmond, Virginia which is in Chesterfield County, Virginia.

11. Reichlin went to Virginia's residence to serve two misdemeanor warrants on Virginia. When Reichlin arrived at the residence, Virginia was at work. At the residence were Virginia's five minor children: plaintiffs Staniel and Stanton; and, Tabeth, age 7; Tony, age 5; and, Mia, age 11 months.

12. When Reichlin knocked on the door, Staniel answered through the closed door. Reichlin identified himself as a police officer and said the he had a warrant for Virginia's arrest.

13. Staniel told Reichlin she could not open the door because her mother instructed her not to open the door for anyone.

14. Reichlin told Staniel that if she did not open the door, he would break the door down, drag her outside, and choke her to death.

15. Staniel became hysterical. She went to the bedroom and called Virginia, who was at work.

16. Meanwhile, Stanton grabbed a baseball bat and stood next to the closed door in case Reichlin followed through with his threat to break down the door.

17. Staniel contacted Virginia and told her what happened. Virginia told Staniel to calm down and she would be home immediately. Virginia immediately left for her residence.

18. Following her telephone conversation with Virginia, Staniel went back to the door and told Reichlin that her mother was on the way.

19. When Virginia arrived, Reichlin had left the residence. She found all the children were hysterical. They were crying and holding on to each other.

20. After Virginia learned what Reichlin told Staniel, she became concerned and upset at Reichlin's conduct. Virginia telephoned 911 and told the emergency dispatcher what had occurred. The 911 dispatcher advised Virginia that he was sending police officers.

21. About this time, Reichlin returned to the residence and found the door was open. Virginia left the door open when she rushed home.

22. Reichlin entered without knocking or asking permission to do so. He was dressed in a Chesterfield County police uniform.

23. Reichlin told Virginia he had a warrant for her arrest for stealing something in Richmond.

24. Virginia was surprised at the allegation of theft. She told Reichlin she knew nothing about stealing.

25. Virginia, at this time was holding and comforting Mia in her arms. Virginia told Reichlin that before she would do anything she was going to call 911 because she was concerned about his conduct and the statements he made to Staniel when she answered the door.

26. Virginia went to the wall telephone in the kitchen and dialed 911. Just as Virginia was connected to the 911 operator, Reichlin came up behind her and grabbed her in a choke hold. The children began screaming at Reichlin to get his hands off their mother.

27. Reichlin continued to assault Virginia. Stanton attempted to rescue his mother from Reichlin's assault at which point Reichlin swung around and struck Stanton in the face causing Stanton to fall backwards.

28. When Virginia saw Reichlin strike Stanton, she became extremely angry. She grabbed the telephone and redialed 911. At that point, Reichlin ripped the telephone off of the wall.

29. Things began to happen very rapidly. Virginia told Reichlin she was going to sue him for striking her son. Virginia also told Staniel to go into the bedroom and dial 911.

30. Staniel did as she was instructed. Virginia, who was still holding Mia, followed Staniel into the bedroom.

31. Staniel dialed 911 and began to explain the situation to the dispatcher. At this point, Reichlin entered the bedroom and grabbed Virginia in the same choke hold he used earlier in the

kitchen. Staniel hung up the telephone in order to assist her mother.

32. Virginia and the children began screaming in the bedroom. The telephone rang. Staniel answered. A 911 dispatcher told Staniel that the police were on the way.

33. When Reichlin learned it was a 911 dispatcher he ceased his assault on Virginia and retreated to the living room and waited for additional officers to arrive.

34. When additional officers arrived, Virginia started to prepare the children to go with the officers. Stanton overheard Reichlin tell the officers that Virginia resisted arrest.

35. Virginia denied to the other officers that she resisted arrest. She also told them that she had rights.

36. An unknown police officer walked up to Virginia, and told her she had no rights. This officer grabbed Virginia around her neck and squeezed on pressure points. Virginia, who was still holding Mia, fell to her knees and was rendered semi-conscious.

37. The police took Mia from Virginia. When Virginia regained consciousness she was lying on her couch with her hands and feet bound with some kind of strapping material.

38. After subduing Virginia, the same unknown police officer put the same kind of pressure hold on Staniel causing her to not be able to breath.

39. Staniel was able to get away from the officer. She ran from the house. Stanton followed her for a short distance and then returned to the house to see about Virginia.

40. Staniel was so upset that she continued to run and did not return to the house for more than two hours.

41. Virginia was taken to the Chesterfield County Police Department. The children remained in the custody of the police officers at the home at Jalee Drive.

42. The warrants which Reichlin was attempting to serve were warrants that were issued in the City of Richmond General District Court charging that on or about June 29, 1988, Virginia stole property of less that $5.00 from William K. Williamson and that she willfully damaged property of Williamson at 2116 W. Laburnum Avenue.

43. Virginia did not become aware of the existence of these warrants until Reichlin brought them to her residence on March 6, 1990.

44. The warrants were for misdemeanors. The warrants provided that a summons could be issued at the discretion of the officer.

45. At no time did Reichlin request or suggest that Virginia sign a summons so that it would not be necessary for her to be arrested and taken away from her children.

46. As a result of the melee on March 6, 1990, Virginia was charged with several misdemeanor offenses in which Reichlin and other police officers were the complainants.

47. As a result, Virginia remained incarcerated for a period of two days until she could raise a bond of $2,000.00 for her release.

48. Reichlin caused to be issued a misdemeanor warrant against Virginia charging her with attempt to impede him in his duties.

49. Virginia appeared in the General District Court for the City of Chesterfield on February 4, 1991.

50. The Commonwealth moved to dismiss the case against her brought by Reichlin because he did not appear as a witness.

COUNT I

(Excessive use of Force)

51. Plaintiff restates and realleges the preceding paragraphs and incorporates them by reference herein.

52. The conduct of Reichlin in respect to each of the plaintiffs constituted excessive use of force because Reichlin, was authorized by the warrants, to issue summons for the appearance of Virginia.

53. Reichlin's conduct in respect to his comments to Staniel when she answered the door, and his assault of the plaintiffs were further instances of the excessive use of force.

54. Reichlin used substantially more force than was necessary to accomplish the execution of arrest warrants on Virginia.

COUNT II

(Gross Negligence)

55. Plaintiff restates and realleges the preceding paragraphs and incorporates them by reference herein.

56. Reichlin owed to plaintiffs a duty to use ordinary care in the execution of his lawful duties as a police officer.

57. Reichlin's conduct under the circumstances presented was a breach of his duty to use ordinary care in execution of his lawful duties.

58. The resulting injuries to Virginia was a direct and proximate cause of Reichlin's breach of his duties.

59. Reichlin's conduct showed such an indifference that it constituted an utter disregard of caution which amounted to a complete neglect of the safety owed to Virginia.

60. Reichlin's conduct was willful and wanton because he knew or should have known that his reckless indifference to the consequences of his conduct would probably result in serious injuries to Virginia.

COUNTS III

(Assault and Battery)

61. Plaintiffs restate and reallege the preceding paragraphs and incorporate them by reference herein.

62. At the time Reichlin assaulted and battered plaintiffs his conduct exceeded what was necessary to make a lawful arrest on Virginia. Thus the striking of Virginia and Stanton by Reichlin constituted an assault and battery on the person of the plaintiffs.

63. Reichlin's striking and manhandling of Virginia and Stanton was inflicted in a rude insulting and angry way.

64. Virginia and Stanton suffered bodily injury and harm which was proximately caused by Reichlin.

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65. The use of a choke hold on both Virginia and Staniel by the unknown police officer was done in an angry and rude manner and constituted assault and battery.

COUNT IV

(Violation of Virginia's First Amendment Rights)

66. Plaintiffs restate and reallege the preceding paragraphs and incorporate them by reference herein.

67. Virginia's statement to Reichlin that she was going to call 911 and report his conduct towards Staniel to the police was constitutionally protected speech.

68. The actions taken by Reichlin to tear the phone from the wall and assault Virginia when she attempted to make her calls was the substantial motivating factor which caused him to assault Virginia.

69. Reichlin's assault of Virginia, therefore, violates Virginia's right to exercise constitutionally protected speech.

COUNT V

(Malicious Prosecution)

70. The instigation of criminal proceedings against Virginia was done maliciously and without probable cause.

71. The criminal proceedings instituted by Reichlin against Virginia ended in a decision favorable to Virginia.

72. By reason of Reichlin's action, Virginia has been greatly injured in her reputation which has been brought into public dispute among friends and associates.

73. Virginia was also caused great anxiety and mental anguish.

WHEREFORE, plaintiffs pray that this Court enter judgment against the Reichlin jointly and severely in the following amounts:

a. Compensatory damages in the sum of $200,000.00;

b. Because of the willful, wanton, reckless conduct of Reichlin, punitive damages in the amount of $500,000.00; and,

c. Reasonable attorney's fees and costs expended by plaintiff and such other and further relief as the Court deems just and proper.

Respectfully submitted,

Virginia Enweremadu
Staniel Enweremadu
Stanton Enweremadu

By _____
Of Counsel

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TRIAL BY JURY IS DEMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

VIRGINIA ENWEREMADU;

and

STANIEL ENWEREMADU, an infant, by and through Virginia Enweremadu, her mother and next friend;

and

STANTON ENWEREMADU, an infant, by and through Virginia Enweremadu, his mother and next friend

Plaintiffs,

v. CIVIL ACTION NO._____

J. L. REICHLIN, Individually,

and

UNKNOWN POLICE OFFICERS OF THE CHESTERFIELD COUNTY POLICE DEPARTMENT

Defendants.

AMENDED COMPLAINT

COME NOW, your plaintiffs, by and through their counsel, and upon their request to this Court for leave to file an amended complaint pursuant to Rule 15, Federal Rules of Civil Procedure, file herewith their causes of action, and state as follows:

A. PARTIES

1. Plaintiff, Virginia Enweremadu, hereinafter referred to as "Virginia" is a resident of Chesterfield County, State of Virginia. She brings this action in her individual capacity.

2. Plaintiff, Staniel Enweremadu, hereinafter referred to as "Staniel", date of birth is July 17, 1977. She is the infant daughter of Virginia Enweremadu.

3. Plaintiff, Stanton Enweremadu, hereinafter referred to as "Stanton", date of birth is May 29, 1979. He is the infant son of Virginia Enweremadu.

4. Defendant, J. L. Reichlin, hereinafter referred to as "Reichlin", at all times herein mentioned, was a resident of Chesterfield County, Virginia. He was employed as a police officer for the Chesterfield County Police Department.

5. Defendants, unknown police officers, hereinafter referred to as "unknown police officer(s)", were at all times relevant herein, employed by Chesterfield County Police Department as police officers. They responded to the residence of the plaintiffs on March 6, 1990; and, violated the rights of the plaintiffs as is more fully stated within the instant complaint.

6. Each and all of the acts of the defendants set forth herein were done by them under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the State of Virginia and its political subdivisions. The said acts were accomplished by virtue of and under the authority of their office as a police officers of the Chesterfield County Police Department.

B. JURISDICTION

7. This action arises under the United States Constitution, particularly under the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution; and, under the laws of the United States, particularly 42 U.S.C. sections 1983 and 1988.

8. This Court has jurisdiction over these causes of action under 28 U.S.C. § 1343.

9. Plaintiffs further invoke the doctrine of pendent jurisdiction and request this Court to allow them to append in this federal complaint certain stated causes of action to wit, malicious prosecution, assault and battery and gross negligence, all of which arise out of a common nucleus of fact and circumstances. Moreover, judicial economy necessitates that the stated causes of action be heard simultaneously and in conjunction with the federal claims set forth herein.

FACTS

10. At approximately 8:45 p.m. on or about March 6, 1990, Reichlin, acting in his capacity as a Chesterfield County police officer, went to Virginia's residence, 4366 Jalee Drive, Richmond, Virginia which is in Chesterfield County, Virginia.

11. Reichlin went to Virginia's residence to serve two misdemeanor warrants on Virginia. When Reichlin arrived at the residence, Virginia was at work. At the residence were Virginia's five minor children: plaintiffs Staniel and Stanton; and, Tabeth, age 7; Tony, age 5; and, Mia, age 11 months.

12. When Reichlin knocked on the door, Staniel answered through the closed door. Reichlin identified himself as a police officer and said the he had a warrant for Virginia's arrest.

13. Staniel told Reichlin she could not open the door because her mother instructed her not to open the door for anyone.

14. Reichlin told Staniel that if she did not open the door, he would break the door down, drag her outside, and choke her to death.

15. Staniel became hysterical. She went to the bedroom and called Virginia, who was at work.

16. Meanwhile, Stanton grabbed a baseball bat and stood next to the closed door in case Reichlin followed through with his threat to break down the door.

17. Staniel contacted Virginia and told her what happened. Virginia told Staniel to calm down and she would be home immediately. Virginia immediately left for her residence.

18. Following her telephone conversation with Virginia, Staniel went back to the door and told Reichlin that her mother was on the way.

19. When Virginia arrived, Reichlin had left the residence. She found all the children were hysterical. They were crying and holding on to each other.

20. After Virginia learned what Reichlin told Staniel, she became concerned and upset at Reichlin's conduct. Virginia telephoned 911 and told the emergency dispatcher what had occurred. The 911 dispatcher advised Virginia that he was sending police officers.

21. About this time, Reichlin returned to the residence and found the door was open. Virginia left the door open when she rushed home.

22. Reichlin entered without knocking or asking permission to do so. He was dressed in a Chesterfield County police uniform.

23. Reichlin told Virginia he had a warrant for her arrest for stealing something in Richmond.

24. Virginia was surprised at the allegation of theft. She told Reichlin she knew nothing about stealing.

25. Virginia, at this time was holding and comforting Mia in her arms. Virginia told Reichlin that before she would do anything she was going to call 911 because she was concerned about his conduct and the statements he made to Staniel when she answered the door.

26. Virginia went to the wall telephone in the kitchen and dialed 911. Just as Virginia was connected to the 911 operator, Reichlin came up behind her and grabbed her in a choke hold. The children began screaming at Reichlin to get his hands off their mother.

27. Reichlin continued to assault Virginia. Stanton attempted to rescue his mother from Reichlin's assault at which point Reichlin swung around and struck Stanton in the face causing Stanton to fall backwards.

28. When Virginia saw Reichlin strike Stanton, she became extremely angry. She grabbed the telephone and redialed 911. At that point, Reichlin ripped the telephone off of the wall.

29. Things began to happen very rapidly. Virginia told Reichlin she was going to sue him for striking her son. Virginia also told Staniel to go into the bedroom and dial 911.

30. Staniel did as she was instructed. Virginia, who was still holding Mia, followed Staniel into the bedroom.

31. Staniel dialed 911 and began to explain the situation to the dispatcher. At this point, Reichlin entered the bedroom and grabbed Virginia in the same choke hold he used earlier in the kitchen. Staniel hung up the telephone in order to assist her mother.

32. Virginia and the children began screaming in the bedroom. The telephone rang. Staniel answered. A 911 dispatcher told Staniel that the police were on the way.

33. When Reichlin learned it was a 911 dispatcher he ceased his assault on Virginia and retreated to the living room and waited for additional officers to arrive.

34. When additional officers arrived, Virginia started to prepare the children to go with the officers. Stanton overheard Reichlin tell the officers that Virginia resisted arrest.

35. Virginia denied to the other officers that she resisted arrest. She also told them that she had rights.

36. An unknown police officer walked up to Virginia, and told her she had no rights. This officer grabbed Virginia around her neck and squeezed on pressure points. Virginia, who was still holding Mia, fell to her knees and was rendered semi-conscious.

37. The police took Mia from Virginia. When Virginia regained consciousness she was lying on her couch with her hands and feet bound with some kind of strapping material.

38. After subduing Virginia, the same unknown police officer put the same kind of pressure hold on Staniel causing her to not be able to breath.

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39. Staniel was able to get away from the officer. She ran from the house. Stanton followed her for a short distance and then returned to the house to see about Virginia.

40. Staniel was so upset that she continued to run and did not return to the house for more than two hours.

41. Virginia was taken to the Chesterfield County Police Department. The children remained in the custody of the police officers at the home at Jalee Drive.

42. The warrants which Reichlin was attempting to serve were warrants that were issued in the City of Richmond General District Court charging that on or about June 29, 1988, Virginia stole property of less that $5.00 from William K. Williamson and that she willfully damaged property of Williamson at 2116 W. Laburnum Avenue.

43. Virginia did not become aware of the existence of these warrants until Reichlin brought them to her residence on March 6, 1990.

44. The warrants were for misdemeanors. The warrants provided that a summons could be issued at the discretion of the officer.

45. At no time did Reichlin request or suggest that Virginia sign a summons so that it would not be necessary for her to be arrested and taken away from her children.

46. As a result of the melee on March 6, 1990, Virginia was charged with several misdemeanor offenses in which Reichlin and other police officers were the complainants.

47. As a result, Virginia remained incarcerated for a period of two days until she could raise a bond of $2,000.00 for her release.

48. Reichlin caused to be issued a misdemeanor warrant against Virginia charging her with attempt to impede him in his duties.

49. Virginia appeared in the General District Court for the City of Chesterfield on February 4, 1991.

50. The Commonwealth moved to dismiss the case against her brought by Reichlin because he did not appear as a witness.

COUNT I

(Excessive use of Force)

51. Plaintiff restates and realleges the preceding paragraphs and incorporates them by reference herein.

52. The conduct of Reichlin in respect to each of the plaintiffs constituted excessive use of force because Reichlin, was authorized by the warrants, to issue summons for the appearance of Virginia.

53. Reichlin's conduct in respect to his comments to Staniel when she answered the door, and his assault of the plaintiffs were further instances of the excessive use of force.

54. Reichlin used substantially more force than was necessary to accomplish the execution of arrest warrants on Virginia.

COUNT II

(Gross Negligence)

55. Plaintiff restates and realleges the preceding paragraphs and incorporates them by reference herein.

56. Reichlin owed to plaintiffs a duty to use ordinary care in the execution of his lawful duties as a police officer.

57. Reichlin's conduct under the circumstances presented was a breach of his duty to use ordinary care in execution of his lawful duties.

58. The resulting injuries to Virginia was a direct and proximate cause of Reichlin's breach of his duties.

59. Reichlin's conduct showed such an indifference that it constituted an utter disregard of caution which amounted to a complete neglect of the safety owed to Virginia.

60. Reichlin's conduct was willful and wanton because he knew or should have known that his reckless indifference to the consequences of his conduct would probably result in serious injuries to Virginia.

COUNTS III

(Assault and Battery)

61. Plaintiffs restate and reallege the preceding paragraphs and incorporate them by reference herein.

62. At the time Reichlin assaulted and battered plaintiffs his conduct exceeded what was necessary to make a lawful arrest on Virginia. Thus the striking of Virginia and Stanton by Reichlin constituted an assault and battery on the person of the plaintiffs.

63. Reichlin's striking and manhandling of Virginia and Stanton was inflicted in a rude insulting and angry way.

64. Virginia and Stanton suffered bodily injury and harm which was proximately caused by Reichlin.

65. The use of a choke hold on both Virginia and Staniel by the unknown police officer was done in an angry and rude manner and constituted assault and battery.

COUNT IV

(Violation of Virginia's First Amendment Rights)

66. Plaintiffs restate and reallege the preceding paragraphs and incorporate them by reference herein.

67. Virginia's statement to Reichlin that she was going to call 911 and report his conduct towards Staniel to the police was constitutionally protected speech.

68. The actions taken by Reichlin to tear the phone from the wall and assault Virginia when she attempted to make her calls was the substantial motivating factor which caused him to assault Virginia.

69. Reichlin's assault of Virginia, therefore, violates Virginia's right to exercise constitutionally protected speech.

COUNT V

(Malicious Prosecution)

70. The instigation of criminal proceedings against Virginia was done maliciously and without probable cause.

71. The criminal proceedings instituted by Reichlin against Virginia ended in a decision favorable to Virginia.

72. By reason of Reichlin's action, Virginia has been greatly injured. in her reputation which has been brought into public dispute among friends and associates.

73. Virginia was also caused great anxiety and mental anguish.

WHEREFORE, plaintiffs pray that this Court enter judgment against Reichlin jointly and severely in the following amounts:

a. Compensatory damages in the sum of $200,000.00;

b. Because of the willful, wanton, reckless conduct of Reichlin, punitive damages in the amount of $500,000.00; and,

c. Reasonable attorney's fees and costs expended by plaintiff and such other and further relief as the Court deems just and proper.

Respectfully submitted,

Virginia Enweremadu
Staniel Enweremadu
Stanton Enweremadu

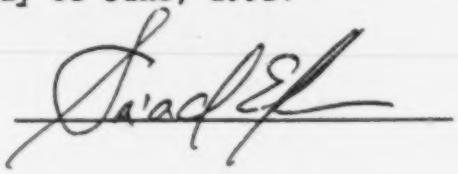
By _____
Of Counsel

Sa'ad El-Amin, Esquire
El-Amin & Crawford, P.C.
4221 Chamberlayne Avenue
Richmond, Virginia 23227
(804) 264-2375
VSB# 5506

TRIAL BY JURY IS DEMANDED

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Amended Complaint was mailed postage prepaid to Steven L. Micas, County Attorney, Chesterfield County, P.O. Box 40, Chesterfield, Virginia 23832 this 8th day of June, 1992.



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

VIRGINIA ENWEREMADU, et al,	)	
Plaintiffs,	)	
v.	)	File No. 91-598
J.L. REICHLIN, et al,	)	
Defendants.	)	

FILED
JUN 18 1992
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

MEMORANDUM OPINION

This matter is before the Court on Plaintiff's Motion to Alter and Amend Judgment and Relief from Judgment, pursuant to Fed. R. Civ. P. 59(e) and 60(b)(1) and (6). Plaintiff has also moved the Court for leave to file an amended complaint. For the reasons stated below, these motions are DENIED.

BACKGROUND

On May 13, 1992, the Court issued an Order and Memorandum Opinion dismissing Ms. Enweremadu's federal claims with prejudice and declining to exercise jurisdiction over her state law claims. The Plaintiff's Section 1983 claim against local police officers was dismissed because Ms. Enweremadu failed to allege a violation of the Fourteenth Amendment, instead relying solely on alleged violations of the First and Fourth Amendments. Despite the fact that the Defendant's motion to dismiss clearly warned her of this omission, at no time prior to dismissal did the Plaintiff request leave to amend her Complaint to include a Fourteenth Amendment

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violation. Ms. Enweremadu is represented by counsel.

MOTION FOR RELIEF FROM JUDGMENT

The Plaintiff, based on Rule 60(b), argues that the Court should relieve her of the judgment entered on May 13, 1992. Rule 60(b) states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(1) and (6).

Plaintiff essentially argues that her pleading errors were a result of "excusable neglect."[1] Ms. Enweremadu's entire excuse is summed up in one confusing sentence: "What is involved in this case is an inadvertent rather than a careless omission by plaintiffs' counsel to recite the Fourteenth Amendment in the jurisdictional portion of the Complaint." (Pl. Br. at 2.) The Plaintiff also contends that it never filed a motion to amend the complaint because it "misunderstood" the Defendant's argument that an excessive force claim under 42 U.S.C. § 1983 must emanate from both the Fourteenth and Fourth Amendments, not just from the latter. Plaintiff's counsel does not clarify how his inadvertence

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[1]The Plaintiff's reliance on Fed. R. Civ. P. 60(b)(6) is misplaced. Relief from a judgment is only granted under this catch-all provision in cases in which a judgment was obtained by the improper conduct of the prevailing party or where a judgment resulted from the excusable default of the losing party under circumstances going beyond the earlier clauses of the rule. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2864 at 213 (1973). Neither scenario is present in this case.

can be construed as something less than pure carelessness, nor does he explain how he could have possibly not understood the thrust of the Defendant's rather simple motion to dismiss.

Before relief from a judgment may be granted pursuant to Rule 60(b), the moving party must first demonstrate the existence of one of the grounds for relief set forth in the Rule. Mere incantation of the words "excusable neglect" without evidence of an acceptable excuse or justification for the moving party's errors is not a sufficient basis for relief. See, e.g., Park Corp. v. Lexington Ins. Co., 812 F.2d 894 (4th Cir. 1987). Plaintiff herself concedes that oversights which rise to the level of ignorance or carelessness will not provide a litigant or attorney for relief under Rule 60(b). See, e.g., Cessna Finance Corp. v. Bielenberg Masonry, 715 F.2d 1442 (10th Cir. 1983).

The argument made by the Defendant in its motion to dismiss was simply that it is the Fourteenth Amendment that constrains the conduct of state and local officials in the same manner that the First and Fourth Amendments restrain the behavior of federal officials. Thus, by failing to allege a violation of the Fourteenth Amendment, Ms. Enweremadu failed to state a claim upon which relief can be granted. It is hard to believe that this elementary argument could have been misunderstood by experienced counsel. Moreover, any conceivable confusion should have been eliminated by the Defendant in his Reply Brief which warned Plaintiff that she had "completely misse[d] the point." (Def. Rep. Br. at 1.)

Even if Plaintiff's counsel did misunderstand the thrust of the Defendant's motion to dismiss, this misunderstanding does not rise to the level of "excusable neglect." As one commentator has written:

> [The moving party] must make some showing of why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law.

11 C. Wright & A. Miller, Federal Practice and Procedure 2858 at 170 (1973); see also, Byrd v. City of Fayatteville, 110 F.R.D. 71, 73-74 (E.D.N.C. 1986) ("If [excusable neglect] is to include a mere palpable mistake by experienced counsel, the requirement will be meaningless."), aff'd without op., 819 F.2d 1137 (4th Cir. 1987); In re Perry, 336 F. Supp. 828 (W.D. Va. 1971) ("[T]here must be some justification for the party's oversight, inadvertence or neglect.").

Plaintiff's assertion that she misunderstood the basis for the Defendant's motion is simply not credible. Even if true, however, such assertion reflects extreme carelessness for which no acceptable excuse has been alleged or shown.

MOTION TO AMEND COMPLAINT

Once a judgment is entered, the filing of an amendment to a complaint cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60. Courts have not construed the broad amendment policy of Rule 15(a) in a manner which would render these other provisions meaningless. In other words, despite the liberal amendment policy of Rule 15(a), a party moving for

amendment after judgment has been entered will be successful only if she first demonstrates that the judgment should be set aside for one of the six reasons specified in Rule 60(b).

CONCLUSION

Because Plaintiff's counsel has demonstrated no justification for his carelessness, the Court finds that the Plaintiff has failed to show "excusable neglect" and, therefore, DENIES the Plaintiffs' motion for relief from judgment. Accordingly, the Plaintiffs' motion to amend the Complaint is also DENIED.

This is a difficult issue. On the one hand, the errors made by Plaintiff's counsel were serious and obvious, although the mistakes were such that they could have been rectified with only minimal effort. Such carelessness should generally not be rewarded by allowing a party to return to the status quo. On the other hand, the person to pay the real price for her attorney's carelessness is the Plaintiff, not her lawyer. Unfortunately, the situation Ms. Enweremadu finds herself in, through no fault of her own, is not uncommon. And while sympathy for such plaintiffs is appropriate, it should not cause courts to easily dismiss the strictures of Rule 60(b) nor to disregard the worthy aims of finality and judicial expediency.

Plaintiff is ADVISED that she may be able to refile her case in state court. Although the Court dimsissed Ms. Enweremadu's federal claims with prejudice, the Court failed to exercise supplemental jurisdiction over her state law claims. Thus, Ms.

Enweremadu, if she has a meritorious claim, may still be able to get some relief in state court.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

6/18/92
DATE

Richard C. Williams
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

VIRGINIA ENWEREMADU, et al,

Plaintiffs,

v.

J.L. REICHLIN, et al,

Defendants.

File No. 91-598

FILED
JUN 18 1992
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

ORDER

This matter is before the Court on Plaintiff's Motion to Alter and Amend Judgment and Relief from Judgment, pursuant to Fed. R. Civ. P. 59(e) and 60(b)(1) and (6). Plaintiff has also moved the Court for leave to file an amended complaint. For the reasons stated in the accompanying Memorandum Opinion, these motions are DENIED.

Plaintiff is ADVISED that she may be able to refile her case in state court. Although the Court dimsissed Ms. Enweremadu's federal claims with prejudice, the Court failed to exercise supplemental jurisdiction over her state law claims. Thus, Ms. Enweremadu, if she has a meritorious claim, may still be able to get some relief in state court.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

6/18/92
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

VIRGINIA ENWEREMADU; STANIEL ENWEREMADU, an infant, by and through Virginia Enweremadu, her mother and next friend; STANTON ENWEREMADU, an infant, by and through Virginia Enweremadu, his mother and next friend,
Plaintiffs-Appellants,

v.

J. L. REICHLIN, individually, UNKNOWN POLICE OFFICERS OF THE CHESTERFIELD COUNTY POLICE DEPARTMENT,
Defendants-Appellees.

No. 92-1845

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-91-598-R)

Argued: June 7, 1993

Decided: August 18, 1993

Before MURNAGHAN, HAMILTON, and LUTTIG, Circuit Judges.

Reversed by unpublished per curiam opinion. Judge Luttig wrote a dissenting opinion.

COUNSEL

ARGUED: Beverly Diane Crawford, EL-AMIN & CRAWFORD, P.C., Richmond, Virginia, for Appellant. Steven L. Micas, County Attorney, Chesterfield, Virginia, for Appellees. **ON BRIEF:** Sa'ad El-Amin, EL-AMIN & CRAWFORD, P.C., Richmond, Virginia, for Appellant. Jeffrey L. Mincks, Deputy County Attorney, Michael S. J. Chernau, Assistant County Attorney, Chesterfield, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Virginia Enweremadu and her two minor children, Staniel and Stanton, have appealed from the district court order dismissing with prejudice their civil rights action for failing to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), and dismissing without prejudice several pendent state law claims, and the court's denial of their request to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b). They have argued on appeal that dismissal of their suit was inappropriate where the only reason cited by the district court was their failure to reference the Fourteenth Amendment in an otherwise sufficient complaint.

The plaintiffs filed the underlying suit for damages against J.L. Reichlin, a police officer with the Chesterfield County Police Department, and other unknown police officers of the Chesterfield County Police Department, alleging that they were assaulted and abused by Reichlin and the other officers when the officers attempted to serve two misdemeanor warrants on Virginia Enweremadu in her home on March 6, 1990.

In their complaint, the plaintiffs give the following account of the events that took place on March 6, 1990. On that date, Reichlin went to the Enweremadus' home in Chesterfield County, Virginia, to serve the misdemeanor warrants on Virginia Enweremadu. When Reichlin arrived, Enweremadu was at work. Enweremadu's daughter Staniel, who was thirteen at the time, answered the door and told Reichlin she could not open the door for anyone per her mother's instructions. Reichlin then allegedly threatened to break down the door, drag Staniel outside, and choke her if she refused to open the door. Staniel became upset and called her mother at work. When Enweremadu arrived home, Reichlin had left the premises, but both her children were upset and crying. Enweremadu called 911 to request assistance.

Shortly thereafter, Reichlin returned, entered without knocking through an open door, and informed Enweremadu that he had a warrant for her arrest. Enweremadu attempted to call 911 again for assistance, and as she did so, Reichlin allegedly grabbed her from behind in a chokehold. Stanton, who was ten years old, attempted to rescue his mother from Reichlin. Reichlin allegedly reacted by striking the boy in the face, throwing him backwards.

Enweremadu has alleged that when she again attempted to call 911, Reichlin pulled the telephone from the wall. Staniel phoned 911 to report the incident, during which time it is charged that Reichlin again grabbed Enweremadu in a chokehold. When the 911 dispatcher called the Enweremadu home, Enweremadu has alleged that Reichlin stopped his assault on her.

According to the plaintiffs, when the other officers arrived, Reichlin told them that Enweremadu had resisted arrest. She denied this; but an unknown officer allegedly grabbed her around the neck and rendered her semi-conscious. When she regained consciousness, she was lying on her couch with her feet and hands bound. Staniel also was grabbed around the neck by the unknown police officers.

Following the arrest, Enweremadu was taken to the Chesterfield County Police Department. The misdemeanor warrants in question had been issued based on Enweremadu's alleged theft of less than five dollars from a Richmond man and her alleged wilful damage of his property. She was unaware of the charges until the day of her

arrest. As a result of the general melee surrounding the execution of the warrants, Enweremadu also was charged with resisting arrest and remained incarcerated for two days until she could raise a $2000 bond. The resisting arrest charge subsequently was dismissed.

Based on the foregoing events as described in their complaint, Enweremadu and her children filed suit pursuant to 42 U.S.C. § 1983 in the federal district court in the Eastern District of Virginia on October 17, 1991. The Enweremadus alleged that Reichlin and the other unknown police officers used excessive force in serving the misdemeanor warrants in violation of the Fourth Amendment and that the officers violated their First Amendment free speech rights. In addition, they proffered state claims of gross negligence, assault and battery, and malicious prosecution. The jurisdictional section referenced the First and Fourth Amendments of the U.S. Constitution, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 1343.

Approximately six months after the complaint was filed (and after the applicable two-year statute of limitations had run), Reichlin and the other officers filed a motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the plaintiffs had failed to state a federal claim upon which relief could be granted, because their complaint did not specifically reference the Fourteenth Amendment.

Plaintiffs' counsel responded in a brief, stating that he understood the interconnection between the Fourteenth Amendment and the First and Fourth Amendment claims. He did not, however, move to amend the complaint. The defendants replied, reiterating their contention that the complaint was inadequate as it did not specifically mention the Fourteenth Amendment.

On May 13, 1992, the district court in a Memorandum Opinion granted defendants' motion to dismiss with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6). The district court concluded that the plaintiffs' failure to cite the Fourteenth Amendment in their complaint was fatal and required dismissal because, under the doctrine of selective incorporation, the First and Fourth Amendments only apply to state officials through the due process clause of the Fourteenth. The court

declined to exercise supplemental jurisdiction over plaintiffs' pendent state law claims, which were dismissed without prejudice.

On May 22, 1992, the Enweremadus filed motions to alter and amend the court's order of May 13, 1992, and for relief from the judgment pursuant to Rules 59(e), 60(b)(1), and 60(b)(6) of the Federal Rules of Civil Procedure. On June 8, 1992, the appellants filed a motion for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a).

On June 18, 1992, the district court entered its order denying plaintiffs' motions to alter and amend judgment, for relief from judgment, and for leave to amend. In its Memorandum Opinion, the district court, in response to plaintiffs' motion for relief from judgment, stated:

> Even if Plaintiff's counsel did misunderstand the thrust of the Defendant's motion to dismiss, the misunderstanding does not rise to the level of "excusable neglect." . . . Plaintiff's assertion that she misunderstood the basis for the Defendant's motion is simply not credible. Even if true, however, such assertion reflects extreme carelessness for which no acceptable excuse has been alleged or shown.

With regard to the motion to amend the complaint, the court concluded that:

> Once a judgment is entered, the filing of an amendment to a complaint cannot be allowed until the judgment is set aside or vacated under rule 59 or Rule 60 . . . In other words, despite the liberal amendment policy of rule 15(a), a party moving for amendment after judgment has been entered will be successful only if she first demonstrates that the judgment should be set aside for one of the six reasons specified in rule 60(b).

The court did not find any of the six reasons to be present and denied the motion. The plaintiffs, by appeal, have challenged both the 12(b)(6) dismissal and the denial of an opportunity to alter or amend.

We review *de novo* the district court's dismissal under Rule 12(b)(6). *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1475 (1992). In conducting our review, we must accept as true all allegations stated in the complaint. *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982). Dismissal under Rule 12(b)(6) is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts to support his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Revene v. Charles County Commrs.*, 882 F.2d 870, 872 (4th Cir. 1989).

The events described in the Enweremadus' complaint, if accepted as true, adequately state a Fourth Amendment claim even without express reference to the Fourteenth Amendment. The contention that the appellants have failed in their pleadings to note the jurisdictional connection provided by the Fourteenth Amendment does not alter the integrity of the factual allegations or otherwise make the complaint appropriate for dismissal under Rule 12(b)(6). Here, the complaint alleged, in part, that Reichlin and the other officers acted unreasonably, in light of the surrounding circumstances, in their use of force against the Enweremadus. If that allegation is proven, then there has been a violation of the Enweremadus' Fourth Amendment rights and they have a cause of action under § 1983. *See Graham v. Connor*, 490 U.S. 386 (1989).

Although it is true, as a technical matter, that the Fourth Amendment only applies to the states by means of the Fourteenth Amendment, it was and is clear from the nature of the action that the appellants have contended that their federal constitutional rights were violated by state officials. The Enweremadus sued the officers under the Civil Rights Act, 42 U.S.C. § 1983, which was enacted in order to allow exactly the type of suit at issue here.* Moreover, the Fourth Amendment, not the Fourteenth, provides the applicable legal standard in an excessive force case. *Graham*, 490 U.S. at 394-397. Thus,

*In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that (1) the defendant deprived her of a federal right and (2) that the defendant did so while acting under color of state law. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Enweremadus adequately alleged both components.

the Fourteenth Amendment is merely the avenue through which Fourth Amendment rights apply to state actors. Accordingly, the failure to mention the Fourteenth Amendment in a complaint does not undermine the validity of the substantive claim, nor justify dismissal where the plaintiffs can prove a set of facts in support of their claim. *Cf. Conley*, 355 U.S. at 45-46.

In the Fourth Circuit, it is well-established that a complaint should not be dismissed if it alleges facts that clearly show jurisdiction exists. In *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 988 (4th Cir.), *cert. denied*, 498 U.S. 982 (1990), we recognized that "it is well settled that courts may excuse pleading defects if the facts alleged in the complaint and the relief requested demonstrate the existence of a substantial federal question." *See Blue v. Craig*, 505 F.2d 830, 844 (4th Cir. 1974) ("[I]f the facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded.") (quoting *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969)). We believe that the facts alleged in the Enweremadus' complaint demonstrate that a federal question is involved.

Consequently, the police officers' motion for a dismissal under Fed. R. Civ. P. 12(b)(6) should have been denied, and the Enweremadus' complaint should be reinstated. The pendent state claims should follow for the applicable rules of law will doubtless be properly dealt with at the appropriate time.

Accordingly, the judgment of the district court is

REVERSED.

LUTTIG, Circuit Judge, dissenting:

The court holds today by unpublished opinion that an experienced district judge abused his discretion in dismissing a complaint under 42 U.S.C. § 1983 filed by counseled plaintiffs which, even after an opportunity to amend had been provided, alleged that *local* police officers violated a plaintiff's *Fourth Amendment* rights. In so holding, the majority not only disregards both parties' arguments (not even the

appellants brought such a claim to this court), it misconstrues the scope of the liberal pleading standards of the Federal Rules of Civil Procedure and ignores one of the most elementary principles of constitutional law — that no cause of action under the Fourth Amendment exists against state and local officials.

The district court lacked both jurisdiction over and the power to afford relief on appellants' complaint because it failed to allege a non-frivolous federal cause of action. As a consequence, the court had no choice under law but to dismiss the complaint under Fed. R. Civ. P. 12(b). I would summarily affirm that dismissal, as well as the court's decision to do so with prejudice.

I.

The relevant facts of this appeal bear repeating. On October 17, 1991, the Enweremadus, through their counsel, Sa'ad El-Amin, Esq., filed a complaint in the district court against appellees, who are local police officers. The Enweremadus averred in the jurisdictional section of their complaint that the action arose "under the provisions of the First and Fourth Amendments to the United States Constitution" and under 42 U.S.C. §§ 1983 and 1988. They asserted that the court had jurisdiction over appellants' federal claims under 28 U.S.C. § 1343. J.A. at 2. The complaint, however, did not reference the Fourteenth Amendment.

On April 6, 1992, appellees moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), on the ground that, because the First and Fourth Amendments do not apply to local officials, "an allegation that a local official has violated the First or Fourth Amendment to the United States Constitution states no claim upon which relief can be granted under 42 U.S.C. § 1983." *Id.* at 12. Appellees argued that, since the Enweremadus alleged only that the officers had abridged their First and Fourth Amendment rights, they had not set forth a federal claim, and "[i]n the absence of a federal cause of action, the Court has no jurisdiction under 28 U.S.C. § 1343." *Id.* at 13.

Mr. El-Amin responded in a formal brief, asserting that he was fully aware of the doctrine of selective incorporation, "which enforces

First and Fourth Amendment Rights against State officials pursuant to the Fourteenth Amendment." He did not, however, move to amend the complaint. *Id.* at 33. The officers' reply brief, dated April 22, 1992, warned the Enweremadus and Mr. El-Amin that they had "completely misse[d] the point" and reiterated that the jurisdictional defect in appellants' complaint was that it "alleged no violation of [their] rights under the Fourteenth Amendment." *Id.*

On May 13, 1992, after providing appellants every opportunity to amend their complaint, the district court dismissed their federal claims with prejudice, and their state claims without prejudice. It thereafter denied Mr. El-Amin's motions to alter and amend judgment, for relief from judgment, and for leave to file an amended complaint that alleged violations of appellants' Fourteenth Amendment rights. Although sympathizing with the Enweremadus for having to suffer for the "serious and obvious" errors and "extreme carelessness" of their "experienced counsel,"[1] the court held that appellants had presented no legal theory and advanced no explanation of their attorney's conduct under which it could disturb its earlier decision. *Id.* at 68-70. This appeal followed.

II.

The majority holds on the aforementioned facts that the district court abused its discretion in dismissing the Enweremadus' complaint. Underlying the court's holding is its fundamentally mistaken belief that the Enweremadus' complaint states a cause of action under the Fourth, even if not under the Fourteenth, Amendment, and thus that they satisfied the requirement of section 1983 that the plaintiff allege a deprivation of a federal right. The court's remarkable conclusion is worthy of quotation: "The events described in the Enweremadus' complaint, if accepted as true, adequately state a Fourth Amendment claim even without express reference to the Fourteenth Amendment." *See ante* at 6; *see also id.* at note 1 (setting forth pleading requirements for section 1983). This, of course, is simply incor-

[1]As the district court correctly observed, Mr. El-Amin was not a novice in the practice of law. He was admitted to the bar in 1969. He is a seasoned civil rights and criminal defense lawyer who has argued over fifteen cases before this court in the last decade.

rect. The Enweremadus' complaint does *not* state a Fourth Amendment claim, because the actions of which they complain are those of state officials, and the Fourth Amendment does not provide a cause of action against such officials.

The majority's fundamental misconception of the nature and interrelationship of the Fourth and Fourteenth Amendments, which appears attributable to its confusion over the fact that Fourth Amendment standards govern Fourteenth Amendment analysis, *see, e.g., ante* at 6-7, causes it, in turn, to misperceive this case as one about the factual sufficiency of pleadings, when instead it is about jurisdiction and the limits on judicial power. As appellees observe, "*[n]o one disputes that appellants here have alleged sufficient facts to support recovery for a constitutional violation.*" Appellees' Br. at 5 n.4 (emphasis added). Thus, the only issue before the court, as appellees argued below, is whether dismissal was required under Rules 12(b)(1) or 12(b)(6) because the Enweremadus' failure to allege a cause of action under the Fourteenth Amendment left the district court without either the jurisdiction to entertain appellants' claims or the power to afford them relief on those claims.[2]

The majority's reliance on *Conley* v. *Gibson*, 355 U.S. 41 (1957), is, for the same reason, misplaced. In *Conley*, the Supreme Court faced contentions that Rule 12(b)(6) dismissal was warranted on two separate grounds: that racial discrimination in collective bargaining representation was not actionable under the Railway Labor Act, and that the plaintiffs' complaint failed to set out specific facts to support their claim of discrimination. *Id.* at 45-47. The Court rejected the first contention based on its precedent, and the second because "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim," but may instead be satisfied by a short, plain statement of the claim. *Id.* at 47.

[2]Although the differences between Rules 12(b)(1) and 12(b)(6) are often significant, in this context they are of little, if any, practical importance, and dismissal was required under both rules. Because appellants' claim of a Fourth Amendment violation was patently frivolous, the court had no jurisdiction over the complaint. *See Bell* v. *Hood*, 327 U.S. 678, 681-83 (1946). By the same token, because the complaint was not based upon an existent federal cause of action, it also was not one upon which relief could be granted.

Conley does not address the question of whether Rule 12(b)(6) dismissal is appropriate when relief cannot be granted because the complaint urges recovery on the basis of a nonexistent federal cause of action. Nor does that case address the circumstances under which Rule 12(b)(1) dismissals are appropriate because of the frivolousness of a putative federal cause of action. That case addresses only the circumstances under which Rule 12(b)(6) dismissal is appropriate on the ground that the plaintiff failed to allege sufficiently the facts supporting an undisputed federal cause of action. *See id.* at 45-46 ("[A] complaint should not be dismissed *for failure to state a claim* unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." (emphases added)). *Conley*, in other words, teaches only that a court determining whether a complaint sets forth the material elements of a claim should liberally construe the facts alleged in support of a cognizable federal cause of action; it in no respect relieves plaintiffs of their obligation to assert a claim cognizable within the jurisdiction of the district court and upon which the court can grant relief. *See, e.g., Leimer* v. *State Mut. Life Assur. Co.*, 108 F.2d 302, 305 (8th Cir. 1940) (cited with approval in *Conley*, 355 U.S. at 46 n.5) (Federal Rules of Civil Procedure "require that a complaint shall contain . . . the necessary jurisdictional averments" in addition to "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" (emphasis added) (quoting Fed. R. Civ. P. 8(a)(2))).[3]

[3]The majority relies upon *Provident Life & Accident Ins. Co.* v. *Waller*, 906 F.2d 985 (4th Cir. 1990), *cert. denied*, 498 U.S. 982 (1990), and *Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974), for its conclusion that the district court abused its discretion in dismissing the Enweremadus' suit. Neither case suggests an abuse of discretion by the district court. The court created in *Provident Life* the very federal common law cause of action upon which it concluded that federal jurisdiction rested. The plaintiff, therefore, previously had no reason to believe that such a cause of action even existed. In *Blue*, the plaintiff specifically pleaded, *by citation to the relevant statute*, a proper cause of action. 505 F.2d at 834. In *dicta*, the court observed that the plaintiff also had an alternative ground for possible recovery under the Supremacy Clause of the Constitution. As to this ground, however, the plaintiff specifically pleaded the *jurisdictional* fact that gave rise to the federal cause of action, namely, that the state regulation conflicted with the federal statute. *Id.* at 844.

Perhaps, as the majority asserts, this case does turn on a technicality, but the statutory and constitutional requirements and limitations of federal jurisdiction and power are not the sort of technicalities that we are free to ignore. Neither are the fundamental principles governing the Fourteenth Amendment's relationship to the Bill of Rights. The Fourteenth Amendment is not "*merely* the avenue through which Fourth Amendment rights apply to state actors," as the majority suggests. *Ante* at 7 (emphasis added). Through the doctrine of selective incorporation of the Bill of Rights into the Fourteenth Amendment's due process clause, that Amendment is the *source* of any substantive rights susceptible to vindication through section 1983 that the Enweremadus had against the state appellees.[4] If, as the majority seems to believe, the Fourth Amendment independently represented a source of substantive rights against appellees, incorporation of the Fourth Amendment as against the States would never have been necessary. Therefore, because appellants failed to allege a violation of their Fourteenth Amendment rights, the district court had no jurisdic-

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Thus, that court had no occasion even to address the question presented *sub judice*.

Here, in contrast, the Enweremadus pled a specific cause of action that, at law, does not exist. In this context, even assuming it would have been error to dismiss the complaint without providing an opportunity to amend, *see id.*, it certainly was not an abuse of discretion to dismiss the case after having given the plaintiffs ample opportunity to amend, as did the district court.

[4]*See, e.g., Wallace* v. *Jaffree*, 472 U.S. 38, 49 (1985) (relationship of Fourteenth and First Amendments); *Baker* v. *McCollan*, 443 U.S. 137, 141-42 (1979) (relationship of Fourteenth and Fourth Amendments). *Graham* v. *Connor*, 490 U.S. 386 (1989), cited by the majority, is not to the contrary. There, in a case involving a claim of excessive use of force made against local police officers, the Supreme Court held that all excessive force claims are to be analyzed under the Fourth Amendment's "reasonableness" standard. The Fourth Amendment was not the source of the right allegedly infringed upon by the officers, however; *the Court explicitly noted that the plaintiff had alleged that the officers' excessive use of force had violated "rights secured to him under the Fourteenth Amendment to the United States Constitution."* *Id.* at 390 (internal quotation omitted) (emphasis added).

tion to hear the case, no power to afford relief, and therefore no choice but to dismiss the Enweremadus' complaint.[5]

Significantly, not even appellants contend otherwise. Although the court frames appellants' argument to be "that dismissal of their suit was inappropriate where the only reason cited by the district court was their failure to reference the Fourteenth Amendment in an otherwise sufficient complaint," *ante* at 4, this is not appellants' argument. And no doubt they will be surprised to learn that such an argument, which would be tantamount to a reaffirmation of the very error they committed below, has been ascribed to them.[6] Rather, appellants effectively (and candidly) admit that dismissal for failure to allege a violation of the Fourteenth Amendment was proper. Their only contention, both in their brief and at argument, is that the district court "abused its discretion in dismissing the [§ 1983 claims] *with* prejudice." Appellants' Br. at 8 (emphasis added); *id.* (Because failure to allege violation of the Fourteenth Amendment could easily have been cured, "dismissal with prejudice was an abuse of the court's discretion."); *see also id.* at 1-2.

III.

The result in this case that is dictated by law may seem harsh on appellants. Indeed, the driving force behind the court's decision

[5]The complaint did not meet the requirements set forth in Federal Rule of Civil Procedure 8, as the majority asserts, *see ante* at 6 n.*. Not only was its jurisdictional statement defective, *see* Fed. R. Civ. P. 8(a)(1), but the complaint also did *not* show that the Enweremadus were entitled to relief in federal court, as required by Fed. R. Civ. P. 8(a)(2).

[6]If the court had addressed instead the argument made by the appellants, presumably it would have had to affirm the district court's decision to dismiss with prejudice because, as the majority itself notes, *ante* at 4, the statute of limitations had already run on the Enweremadus' section 1983 claims by the time the district court dismissed the complaint. I would not hesitate to affirm the district court's decision to dismiss with prejudice on this ground or on the alternative ground of the inexplicable, inexcusable, and, suggest appellees, even arrogant, failure of Mr. El-Amin to amend the complaint, despite repeated promptings to do so from appellees and the district court.

appears to be its sense that it would be "unfair" if Virginia Enweremadu and her children, who have alleged unlawful mistreatment at the hands of Officer Reichlin and his unknown companions, were to be deprived of their opportunity for redress as a result of the errors and incompetence of their attorney.[7] *See ante* at 6 (quoting Fed. R. Civ. P. 8(f)). To the extent that the facts alleged in the complaint are true, I share the majority's solicitude for the Enweremadus, but my sympathy does not extend so far as to allow me to disregard what I understand to be the law. Jurisdictional requirements and limitations on the judicial power must be respected, and dismissal in this case works no more "unfairness" than it does in similar contexts.

For example, in *Mallas* v. *United States*, No. 92-1982 (4th Cir. May 20, 1993), this court, relying on *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), dismissed for lack of appellate jurisdiction four out of the five plaintiffs who had sought to appeal because their attorney had failed to list them specifically in the notice of appeal, instead listing only the first appellant followed by the commonly used Latin phrase "et al." Because Fed. R. App. P. 3(c) provides that "[t]he notice of appeal shall specify the party or parties taking the appeal," and because the Supreme Court held in *Torres* that "et al." does not satisfy the rule's specificity requirement, we held that we had obtained jurisdiction only "over the only party specified as an appellant in the notice of appeal." *Mallas*, slip op. at 8. Had the attorney for the dismissed plaintiffs in *Mallas* specifically named them in the notice of appeal, his clients would have prevailed under this court's decision on the merits.

[7] I am puzzled by the majority's insistence that Mr. El-Amin's persistent refusal to plead the Fourteenth Amendment in a section 1983 suit against local police officers "does not appear even to rise to the level of misstep," despite repeated warnings that this failure would be jurisdictionally fatal to the Enweremadus' action. *See ante* at 7. In my view, had we affirmed the district court, the Enweremadus would have had a viable malpractice claim against their lawyer, who, interestingly, was only recently found by this court to be guilty of an "inexcusable breach of professional conduct." *Doyle* v. *Murray*, 938 F.2d 33, 35 (4th Cir. 1991). In any event, Mr. El-Amin is today the beneficiary of judicial largesse, and any effort by his defenders to cloak that fact in an assertion that his service to his clients in this matter was anything but indefensible would be unwarranted.

And, of course, an untold number of otherwise viable claims are barred on jurisdictional grounds every day because of an attorney's failure to file a complaint within the applicable statute of limitations. In fact, by missing filing deadlines, by forgetting elementary procedural rules, by making strategic errors at trial, or by otherwise intentionally or inadvertently committing what subsequently are revealed to be mistakes, lawyers regrettably lose winnable cases for their clients every day. That is a risk that, in the interests of both order and finality, our legal system generally requires the client to bear. In some instances, the client may have legal recourse against his attorney in the form of a malpractice suit. In no case, however, should, or in my view, *can*, a court gratuitously offer litigants relief from their counsel's errors by ignoring statutory and constitutional constraints imposed upon the judicial power.

IV.

The Supreme Court has repeatedly observed that, to a large extent, "the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States . . . ." *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *see also Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983) (quoting this *Kohler Die* language with approval). Here, the Enweremadus did not state on the face of their complaint a nonfrivolous cause of action under federal law. Accordingly, the district court not only lacked jurisdiction over the complaint, it lacked the power — under any facts they might allege — to afford the Enweremadus relief on their complaint. The district court had no choice but to dismiss the case. Because the majority concludes that the district court erred merely by following the law and affecting the required dismissal, I respectfully dissent.

0938-4136

September 22, 1993

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RE: Vacom, Inc. v. The Board of Supervisors of Fairfax County, et al.
At Law No. 119742

Dear Counsel:

This matter comes before the Court on the Defendants' Demurrers and Pleas in bar. Having considered the arguments and memoranda of counsel and for the reasons set forth below, the Court partially sustains and partially overrules the Defendants' Demurrers and Pleas in Bar.

FACTS

The facts in this case are set forth in the pleadings. VACOM Inc. (VACOM), is the owner of certain property located near the intersection of Route 28 and Route 29 in Centreville, Virginia. Soon after acquiring the property, VACOM applied for approval of a site plan in order to begin improvement and development of the property. The site plan was denied by Fairfax County. VACOM subsequently submitted five amended site plans, all of which were all denied by the County.

In its Motion for Judgment, VACOM alleges that the County has refused to approve any site plan until Vacom dedicates a portion of the land to the County for the Route 28/29 interchange; that the repeated refusal to approve the site plans prevents construction on the property and prohibits any economically viable use of the

property; that the County has not similarly restricted other similarly situated landowners in the area; and that the actions of the County amount to a taking of VACOM's property without just compensation and without due process of law.

DEFENDANTS' PLEAS IN BAR

The grounds of the Defendants' Pleas in Bar are briefly listed below, followed by the Court's rulings.

1. The Motion for Judgment fails to state a cause of action or facts upon which relief can be granted.

OVERRULED. A Demurrer, not a Plea in Bar, is used to test the legal sufficiency of the Plaintiff's pleading.

2. The action is barred by §15.1-475 of the Code of Virginia, which requires any appeal of a disapproval of site plans to be filed within 60 days of the disapproval.

PARTIALLY SUSTAINED AND PARTIALLY OVERRULED. In separate Counts in the Motion for Judgment, plaintiff seeks:

1. A declaratory judgment that Vacom's property has been taken by the County or an injunction requiring the County to approve the site plan.

2. An injunction to compel the County to approve the site plan and $250,000 damages under §1983 or $750,000 in compensation for the taking.

The request for a declaratory judgment that the County has taken VACOM's property without just compensation and a request for damages under §1983 for violating Vacom's rights to just compensation and due process of law are not barred by the 60-day time limit. The declaratory judgment and damages requests are not appeals from the six site plan disapprovals and therefore the Plea in Bar is overruled as to these counts.

The requests for a mandatory injunction requiring the County to approve VACOM's site plans is in essence an appeal of the disapproval of the site plans and is thus barred by the 60-day time limit on such appeals. The Plea in Bar is sustained as to the request for a mandatory injunction.

3. The site plans were disapproved for reasons unrelated to improvements to the Route 28/29 interchange.

OVERRULED. This assertion is not properly raised by a Plea in Bar.

4. The § 1983 claim is barred by the two-year Statute of Limitations, assuming the §1983 claim is ripe.

OVERRULED. In deciding whether the § 1983 claim is barred by the two-year Statute of Limitations, two issues must be addressed:

1. Was the Statute of Limitations tolled during the pendency of the federal suit? The Court holds that it was not. § 8.01-229(E)(1) of the Code of Virginia provides that if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period.

Plaintiff argues that the words "any action" are board and should be construed to include actions brought in federal court. Defendants argue that § 8.01-229(E)(1) must be read in conjunction with § 8.01-2 Code of Virginia. § 8.01-2 defines "action" only in terms of state court actions: "action includes civil proceedings at law or equity, and in either circuit courts or district courts". In addition, 8.01-229(E)(3) specifically includes federal actions within the meaning of that section. If the General Assembly had intended federal suits to toll the statute of limitations under § 8.01-229(E)(1), it would have specifically so provided, as it did under § 8.01-229(E)(3). The court agrees with the defendants.

2. When did the cause of action accrue? Defendants have the burden of proving the date of accrual. Defendants do not directly address the accrual issue; rather, they focus on the tolling issue. Plaintiff asserts that the cause of action accrued on September 27, 1990, the date the sixth site plan was rejected. Plaintiff also seeks to present evidence that the cause did not accrue until March 15, 1991, when the full significance of the site plan rejections was conveyed to Plaintiff by letter.

Although the court finds that the Statute of Limitations was not tolled during the pendency of the federal suit, the tolling issue is not dispositive. For the Statute of Limitations to bar

the Plaintiff's claim, Defendants must prove the date of accrual of the cause of action. The Defendants' having failed to do, the Plea in Bar is overruled.

5. Plaintiff cannot maintain the § 1983 claim because Plaintiff has not alleged the violation of a constitutional right. The only property right that VACOM alleges to have been taken is in its site plans, but VACOM had no vested rights in the unapproved site plans.

OVERRULED. This is essentially an attack on the pleading, more appropriately raised on Demurrer.

6. VACOM fails to allege sufficient facts from which the court could conclude that Defendants' actions constituted a violation of Plaintiff's due process rights. VACOM also has not attempted to develop the property for any other use than that shown on the site plans.

OVERRULED. The sufficiency of the Plaintiffs' Motion for Judgment should be tested by Demurrer.

7. The Motion for Judgment is deficient in that it fails to plead specific facts from which the court could conclude that damages under § 1983 are appropriate.

OVERRULED. Challenges to the sufficiency of the Plaintiff's pleading are raised by Demurrer.

8. The § 1983 damages claim is not ripe because the Plaintiff has not complied with the inverse condemnation procedures under § 8.01-187.

SUSTAINED. Defendants argue that the § 1983 claim is not ripe because there has been no threshold declaration that there has in fact been an unconstitutional taking of VACOM's property. The court finds Defendants' argument to be persuasive. In Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985), the Supreme Court held that a plaintiff must seek compensation through state procedures before a taking claim under § 1983 will be ripe. No constitutional violation occurs until just compensation is denied. A taking is not itself unconstitutional; the violation occurs when there is a taking without just compensation. The nature of the constitutional right requires the plaintiff to utilize state procedures for obtaining compensation

before bringing a § 1983 claim. If a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the just compensation clause until it has used the procedure and been denied just compensation. Virginia has an adequate procedure for seeking just compensation, § 8.01-187, which VACOM has not invoked.

The court in Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222 (1988), applied Williamson to find a § 1983 claim premature, despite the plaintiff's argument that the Virginia courts had not decided whether damages for regulatory takings were available under the state inverse condemnation procedure. 690 F. Supp. at 224. The court held that a plaintiff bears the burden of demonstrating that the state procedure for obtaining compensation is inadequate or unavailable. Since Virginia has a statute explicitly permitting compensation in inverse condemnation actions, the court held that Williamson applied; the plaintiff had to use § 8.01-187 before bringing a § 1983 claim.

The Supreme Court in Williamson also found that plaintiffs are not required to bring a declaratory judgment action prior to bringing a § 1983 claim because that procedure is remedial in nature. However, there can be no unconstitutional taking until there is a taking without just compensation. In order to determine that just compensation has been denied, the state remedies, such as § 8.01-187 must be utilized to request and be denied compensation. Since VACOM has not used § 8.01-187, its § 1983 claim is not ripe.

Similarly, in Williamson, the Supreme Court found that administrative actions must be final before they are judicially reviewable:

> The Commission's refusal to approve the preliminary plat does not determine [the finality] issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining variances. The Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property and therefore is not a final, reviewable decision.

Williamson, 472 U.S. at 193-94. Defendants claim no variance has been sought by VACOM. The Court having already ruled on the § 1983 claim as provided above, and the issue of seeking a variance not clear from the motion for judgment, no ruling is issued on those grounds of the plea.

9. Under § 15.1-554 VACOM may only bring this action if it first submits a claim to the Board of Supervisors for allowance.

OVERRULED. VACOM's claim was submitted to the Board by letter dated August 28, 1992. VACOM alleges that the Board has refused to respond. By refusing to respond the County has refused or neglected VACOM's claim. See Board of Supervisors v. Miller & Smith, 222 Va. 230, 279 S.E.2d 168 (1981).

10. The Board is not a proper party because it does not have primary authority for approving or disapproving site plans.

OVERRULED. This ground is overruled on its merits and because misjoinder is reached by demurrer, not plea in bar.

DEFENDANTS' DEMURRERS

The defendants' grounds of demurrer are briefly listed below, followed by the Court's rulings.

1. The Motion for Judgment does not state a cause of action or facts upon which relief can be granted. VACOM's site plans had many problems and therefore, VACOM did not submit a site plan that DEM was required to approve.

OVERRULED. VACOM has stated facts upon which relief can be granted. VACOM has asserted that the County has taken its property without just compensation and in violation of its due process rights. VACOM alleges that the County is denying VACOM all economically viable uses of its property by refusing to approve VACOM's site plans unless VACOM dedicates part of its land. VACOM also alleges that six site plans were rejected and that the County stated that it would not review any more site plans until the dedication was made.

Defendants may not allege new facts (that VACOM's site plans had many problems and were rejected due to those problems) to defeat the Plaintiff's claim on Demurrer.

3. As a challenge to the September 1990 disapproval of VACOM's sixth site plan, § 15.1-475 requires any such appeal to be filed within sixty days of disapproval.

OVERRULED. This issue was decided on Defendants' Plea in Bar No. 1 above.

4. VACOM fails to allege that its site plans conformed to all applicable ordinance requirements and should have been approved.

OVERRULED. This ground is overruled for the same reason as Demurrer No. 1.

5. VACOM's § 1983 claim is barred by the Statute of Limitations as more than two years have passed from disapproval of the sixth site plan.

OVERRULED. The defense of the Statute of Limitations cannot be raised by Demurrer. It is an affirmative defense and must be so pleaded.

6. VACOM does not allege the violation of an identifiable constitutional right, and therefore cannot maintain a § 1983 claim. (No vested property right exists.)

OVERRULED. In light of its ruling on Plea in Bar No. 8, the Court finds this grounds of demurrer moot and makes no further ruling.

7. VACOM fails to allege sufficient facts from which the court could conclude that Defendants' actions constitute a violation of Plaintiff's due process rights.

OVERRULED. Plaintiff alleges that Defendants disapproved the site plans because VACOM would not dedicate a portion of its land, and that disapproval prevents construction and prohibits an economically viable use of the property. A violation of VACOM's due process rights has been sufficiently alleged.

8. VACOM has failed to allege sufficient facts for the court to find a taking has occurred.

OVERRULED. Plaintiff alleges that the Defendants refused all six site plans, that Plaintiff is unable to begin construction, and that without construction, the plaintiff is deprived of all

economically viable uses of its property. Plaintiff has therefore alleged sufficient facts for the court to find that a taking has occurred.

9. VACOM fails to allege that it has attempted to develop the property for any other use than that shown on the site plan.

OVERRULED. Such an allegation is unnecessary to claim a violation of Plaintiff's due process rights and a taking. VACOM alleges that the County has repeatedly refused to approve all of its submitted site plans, that VACOM cannot begin construction on its land, and that VACOM cannot make any economically viable use of its property. In addition, VACOM has alleged that the County has refused to consider any other site plans until VACOM makes the required dedication of its land.

10. VACOM fails to allege that the Board has prevented it from using the subject property for any purpose other than the purpose sought under the site plans.

OVERRULED. VACOM is not required to allege these facts in order to state a cause of action. VACOM's allegation is that no site plan would be approved. VACOM alleges that the repeated disapproval of its site plans has prevented VACOM from developing its property; and thus, Vacom has been denied all economically viable uses of its property.

11. The § 1983 claim cannot be maintained because VACOM has no vested rights in the unapproved site plans.

In light of its ruling on Plea in Bar No. 8, the court finds this grounds of demurrer moot and makes no further ruling.

12. The Motion for Judgment fails to plead specific facts from which the court could conclude that § 1983 damages are appropriate.

In light of its ruling on Plea in Bar No. 8, the court finds this grounds of demurrer moot and makes no further ruling.

13. The Plaintiff's § 1983 claim is not ripe.

14. VACOM's § 1983 damages claim is premature because VACOM fails to allege compliance with Virginia's inverse condemnation procedures.

In light of its ruling on Plea in Bar No. 8, the court finds this grounds of demurrer moot and makes no further ruling.

15 & 16. VACOM has failed to allege that it has obtained a declaratory judgment that its property has been taken, and that 60 days have passed since the entry of the declaratory judgment.

OVERRULED. Plaintiff need not allege these facts. § 8.01-187 merely provides an avenue by which a plaintiff may obtain a determination of the amount of compensation due after there has been a declaratory judgment that its property has been taken. If in the declaratory judgment action, the court fails to provide for the amount of compensation, the plaintiff may invoke § 8.01-187 to obtain a determination of the amount due.

17. VACOM fails to allege that it has exhausted all state remedies.

In light of its ruling on Plea in Bar No. 8, the court finds this grounds of demurrer moot and makes no further ruling.

18. The Board is not a proper party to this action.

OVERRULED. The agent of the Board of Supervisors has the primary authority to approve and disapprove site plans. The Board's agent is the Director of the DEM. The Director is alleged to have been acting within the scope of his authority when denying VACOM's site plans. Thus, the Board is a proper party.

19. VACOM alleges actions by "the County of Fairfax" as the basis for relief against the Board.

OVERRULED. The Board of Supervisors is the equivalent of the County of Fairfax for purposes of this suit.

Mr. Stoner is directed to prepare an order consistent with these rulings and to forward it to Mr. Arnold for endorsement.

Very truly yours,

Robert W. Wooldridge, Jr.